

Docket No.: FSP-10002/08
(PATENT)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Patent Application of:
Samuel Farchione

Application No.: 09/910,520

Confirmation No.: 2097

Filed: July 20, 2001

Art Unit: 3714

For: **METHOD FOR DETERMINING PROPER
COLOR FOR MAKEUP AND CLOTHING**

APPELLANT'S BRIEF

Real Party in Interest (37 C.F.R. § 67(c)(1)(i))

The real party in interest in this appeal is the Applicant, Mr. Samuel Farchione, a citizen of the United States residing in the State of Florida.

Related Appeals and Interferences (37 C.F.R. § 41.37(c)(1)(ii))

Appeellant, and Appellant's legal representatives, know of no applications, patents, or pending or prior appeals, interferences or judicial proceedings that may be related to, directly affect, that may be directly affected by, or that have a bearing on the Board's decision in this appeal.

Status of Claims (37 C.F.R. § 41.37(c)(1)(iii))

This application included 43 claims. Claims 1 – 7, 11 – 14, 16 – 23 and 27 – 40 are pending and stand rejected under 35 U.S.C. § 103(a). Claims 8 – 10, 15, 24 – 26 and 41 – 43 have been canceled.

Status of Amendments (37 C.F.R. § 41.37(c)(1)(iv))

Appeallant filed one amendment after final that was dated March 31, 2008. In an Advisory Action dated April 21, 2008, the Examiner indicated that for purposes of appeal the March 31st amendment would be entered along with an explanation by the Examiner of how the new or amended claims would be rejected.

Summary of Claimed Subject Matter (37 C.F.R. § 41.37(c)(1)(v))

The application includes independent claims 1, 16, 27 and 33. These claims are all broadly directed to a method of automatically collecting and then analyzing multiple physical characteristics for an individual (i.e., skin color, eye color, hair color) and then generating a report detailing relevant fashion information for that person (i.e., suggested colors of clothing, appropriate make-up shades, etc.). Accordingly, the claimed subject matter is generally directed to a method for selecting fashion information for an individual.

Each independent claim is directed to a method that provides for a style database 12. See Page 4, line 21 – Page 5, line 16. In claims 1 and 27, the style database 12 may specifically include complimentary fashion information such as cosmetic data and a physical characteristic data. See Page 5, lines 4 – 16.

All four independent claims also provide for the use of other devices, including a personal characteristic database 14. See Page 7, lines 2 – 9. The database 14 may receive

physical characteristic data for an individual via an input device 16. See e.g., Page 10, lines 8 – 13.

All four independent claims provide for the input device 16. See Page 9, line 5 – Page 10, line 7. In claims 1, 16 and 27 the input device 16 may capture an image of the individual that includes data on at least two physical characteristics about the individual. However, claim 33 differs from the other claims in that it provides that the input device 16 may simply capture physical characteristic data about the individual and does not reference the “two physical characteristics”.

Claims 1, 16 and 33 include a next step of capturing an image of the individual, with the image including data for at least two physical characteristics. See Page 4, lines 14 – 20; Page 7, lines 10 – 20; Figures 2 and 3. In claim 27, the next step involves receiving in the style database an image that includes data for two physical characteristics.

Claims 1, 16 and 33 next include the step of receiving information in the personal characteristic database. See Page 4, lines 14 – 20; Page 7, lines 10 – 20; Figures 2 and 3. In claims 1 and 16, this step is described as receiving personal characteristic data for at least two physical characteristics for the individual. Claim 33 describes this step more directly as receiving the captured image in the personal characteristic database. Claim 27 does not include a similar step.

Claims 27 and 33 next disclose the step of receiving a requested result for the individual in the style database. See Page 5, lines 4 – 24. Claims 1 and 16 do not include this step.

All the claims next include the step of comparing data. See Page 7, line 21 – Page 8, line 3. In claim 1, the step comprises comparing the physical characteristic data for the individual recorded in the physical characteristic database against the style database to identify fashion

selections for the individual. Claim 16 is similar to claim 1, except that the comparison is more directly based on the “at least two physical characteristics communicated to the personal characteristic database.” In claim 27 the comparison is made in the style database to identify fashion selections that achieve the requested result for the individual based upon the physical characteristic data. Claim 33 is generally of similar scope to claim 27.

All four claims conclude with the generation of a report detailing complimentary fashion selections. See Page 10, line 18 – Page 11, line 10. In claim 1 the report is described as “a hard copy of a data set”. In claim 16 the report is described as “a printout data set”. In claim 27 the report is described as a data set sheet”. Finally, in claim 33 the report is described as a data booklet 20, 20’.

Grounds for Rejection to be Reviewed on Appeal (37 C.F.R. § 41.37(c)(1)(vi))

Pursuant to the Advisory Action dated April 21, 2008, claims 1 – 7, 11 – 14, 16 – 23 and 27 – 40 stand rejected for the reasons set forth in the final rejection dated January 30, 2008.

First Ground of Rejection

In accordance with the final rejection, currently pending claims 1 – 7, 14, 16 – 17, 20, 22 – 23, 27, 32 – 34, 37 and 39 – 40 were rejected under 35 U.S.C. 103(a) as unpatentable over U.S. Patent No. 5,478,238 to Gourtou et al. in view of U.S. Patent No. 4,987,552 to Nakamura et al.

The Advisory Action also included the following comments:

Applicant asserts that it would be improper to combine Gourtou et al since the image data of Gourtou et al is limited to a single physical characteristic. The examiner acknowledges that Gourtou et al captures a single characteristic using the video camera, however, Nakamura et al teaches that a photo may be used to discern multiple characteristics of a user, thus teaching that the image data captured by Gourtou et al may be used for additional purposes and that such was known in the art at the time of the applicant’s invention. The applicant further

asserts that all of the entry of Nakamura et al is a manual entry. Contrary to this assertion Nakamura is relatively silent as to how the information from the interviews, photos, etc are entered into the generator. However, the Gourtou et al invention clearly teaches that a camera, which is known for taking photos, as an input device. Given these two teaching the examiner maintains that it would have been obvious to one of ordinary skill in the art to modify the Gourtou invention to discern multiple characteristics from the image taken.

Second Ground of Rejection

Currently pending dependent claims 12, 13, 18, 19, 28 – 30, 35 and 36 were rejected under 35 U.S.C. 103(a) as being unpatentable over Gourtou et al, in view of Nakamura, in further view of U.S. Patent No. 5,311,293 to MacFarlane.

Third Ground of Rejection

Finally, currently pending dependent claims 11, 21, 31 and 38 were rejected under 35 U.S.C. 103(a) as being unpatentable over Gourtou et al, in view of Nakamura, in further view of to MacFarlane, and in view of U.S. Patent No. 5,206,804 to Theis et al.

Argument (37 C.F.R. § 41.37(c)(1)(vii))

First Ground of Rejection at to all Independent Claims

In the Advisory Action, the Examiner argued that the device of Gourtou et al. in combination with the photo of Nakamura et al may be used to discern multiple characteristics of a user. Thus the image data captured by Gourtou et al may be used for additional purposes and that such was known in the art at the time of the applicant's invention. Applicant, however, respectfully disagrees. One of skill in the art would have not looked to the combination of Gourtou et al. (which is limited to measuring a single physical characteristic) with Nakamura et al. (which relies upon old manual, analog data collection and enter in order to function). Nor would the suggested combination teach Applicant's invention.

“[A] patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art. See *KSR International Co. v. Teleflex Inc.*, 82 USPQ2d 1385, 1389 (U.S. 2007).

The independent claims each provide for the use of an input device and for the use of the input device to capture data about two physical characteristics for an individual. This direct capture and input of characteristic data is of importance since it allows for objective recordation and analysis of data. The use of two characteristics is of importance since it permits the analysis of a greater range of fashion selections. For example, if a person is overweight and has blue eyes, the data set generated to meet a requested result (see e.g., claims 27 and 33) of “wanting to appear slimmer” may suggest: 1) certain shades of blue clothes that may include certain patterns (clothing patterns that should be avoided may also be indicated); and 2) certain makeup selection that may highlight and/or obscure certain facial features. This ability to provide input, analyze and provide instruction concerning a range of interrelated fashion selections is not shown or suggested by the prior art.

Gourtou et al. does permit *manual* entry of data for other characteristics, including eye color and hair color using a keyboard. See Gourtou et al, Col. 7, lines 28 – 33; Figure 1. However, in contrast to Applicant’s invention, the direct capture and input of data is limited in Gourtou et al. to the use of a video camera 14 to take a color image of a user’s arm. See Gourtou et al, Col. 3, lines 1 – 4; Col. 6, lines 56 – 67. Thus, as the Examiner has acknowledged, Gourtou et al. limited to “capturing” data for only a single physical characteristic. See Advisory Action dated April 21, 2008.

Moving on to Nakamura et al., this reference adds nothing to Gourtou et al. More specifically, Nakamura et al. does not capture data. It, like Gourtou et al., merely allows for

manual entry of physical characteristic data. For example, at Col. 2, lines 50 – 56 Nakamura et al. teaches that:

[i]nformation concerning characteristics of individual users is entered into the generator 7. For example, information related to a user's face shape may be input in this generator. This information may be obtained, for example through an interview with the customer, a questionnaire, or photographs.

The Examiner has countered that "Nakamura is relatively silent as to how the information from the interviews, photos, etc are entered into the generator." However, it is axiomatic that answers from interview data and answers to questionnaires must first be manually collected and then manually entered (i.e., placed into a digital format) before they might be processed by Nakamura's CPU 6. There is also nothing to suggest that the "photo" of Nakamura is treated any different than the interviews and questionnaires. Indeed, clearly absent from Nakamura et al. is any teaching or suggestion that the photo is ever directly input the Nakamura system. Nakamura et al., merely states that a user may refer to photos, and the questionnaires, and the interviews to obtain and input "information" about the customer. This manual entry of data is not new, is highly subjective, and would not yield a truly objective recordation and analysis of data.

Therefore, in sum, Nakamura et al. adds nothing new when combined with Gourtou et al. Gourtou et al. is limited to capturing an image including only one characteristic. Furthermore, both references disclose that various types of physical data may be manually entered. Thus, at a minimum the cited combination would require the extra step of manual data entry. The reliance of manual entry also means that the combined system would necessarily output information based upon predefined definitions of physical characteristics, and not based upon individual actual characteristics as directly measured and reported by the input device. Indeed, simply absent from art, including the combination of Gourtou et al. and Nakamura et al., is any

disclosure, teaching or suggestion of using an input device operable to capture an image of the individual that includes at least two physical characteristics about the individual.

First Ground of Rejection as to Claims 27 and 33

Claims 27 and 33 each include the step of “receiving in the style database a requested result for the individual”. This step is not taught by the art of record, nor does the final Office Action dated January 31, 2008 indicate how Gourtou et al. and Nakamura et al. teach or suggest this step.

Therefore, Applicant requests that the rejection of claims 27 and 33 be withdrawn.

Second and Third Grounds of Rejection

Dependent claims 8, 9, 12, 13, 18, 19, 24, 25, 28 – 30, 35, 36, 41 and 42 were rejected under 35 U.S.C. 103(a) as being unpatentable over Gourtou et al, in view of Nakamura, in further view of U.S. Patent No. 5,311,293 to MacFarlane. Applicant, however, respectfully submits that these dependent claims are allowable since they depend from an allowable base claim.

Dependent claims 11, 21, 31 and 38 were rejected under 35 U.S.C. 103(a) as being unpatentable over Gourtou et al, in view of Nakamura, in further view of to MacFarlane, and in view of U.S. Patent No. 5,206,804 to Theis et al. Applicant, however, respectfully submits that these dependent claims are allowable since they depend from an allowable base claim.

In addition, Applicant objects to the rejections of the dependent claims to the extent that the rejections depend in part upon MacFarlane.

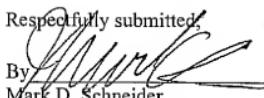
It is a well known tenant of patent law that “[i]t is improper to combine references where the references teach away from their combination.” See M.P.E.P. 2145 at 161 (*citing In re Grasselli*, 713 F.2d 731, 743, 218 USPQ 769, 779 (Fed. Cir. 1983)).

In this case, MacFarlane discussed a method and instruments for use in a color selection system in which a person's skin color is the exclusive determinative factor for color compatibility. Indeed, MacFarlane teaches that when determining personal color categories others have "wrongly relied upon eye color, color of hair and even racial background". See Col. 1, lines 30-32 (*emphasis added*).

Notwithstanding the limited purpose for which MacFarlane is presumably cited, MacFarlane reliance on skin color as sole factor to be used in making a color determination would unquestionably lead those of skill in the art in a direction divergent from the path that was taken by Applicant (i.e. the use of at least two characteristics). As a result, both the M.P.E.P. and the controlling case law strongly support a conclusion that it is improper to combine MacFarlane, with Gourtou et al., Nakamura et al., or other like references where the desired goal is to achieve an invention that used at least two physical characteristics to reach a desired result.

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Respectfully submitted,

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Claims Appendix
(37 C.F.R. § 41.37(c)(1)(viii))

1. (Previously presented) A method for selecting fashion information for an individual comprising the steps of:

providing a style database including complimentary fashion information having cosmetic data and physical characteristic data;

providing a personal characteristic database adapted to receive physical characteristic data for an individual;

providing an input device operable to capture an image of the individual, the image comprising data of at least two physical characteristics about the individual;

capturing with the input device an image of the individual comprising data for at least two physical characteristics of the individual;

receiving in the personal characteristic database physical characteristic data for at least two physical characteristics for the individual;

comparing said physical characteristic data for the individual with the style database to identify complimentary fashion selections that are appropriate for the individual based upon the physical characteristic data received in the personal characteristic database; and

generating a hard copy of a data set that includes complimentary fashion selections that are appropriate for the individual based upon the physical characteristic data received in the personal characteristic database.

2. (Original) The method of claim 1, wherein said style database further comprises instructional data concerning the proper application of cosmetics.

3. (Original) The method of claim 2, wherein said instructional data comprises a multimedia presentation.

4. (Previously presented) The method of claim 3, wherein said multimedia presentation comprises a video presentation.

5. (Original) The method of claim 1, wherein said cosmetic data comprises at least one cosmetic characteristic selected from a group consisting of: cosmetic brand, cosmetic style, colors, textures, medicinal qualities or chemical qualities.

6. (Previously presented) The method of claim 1, wherein said physical characteristic data is selected from a group consisting of: skin color, skin tone, hair color, eye color, facial shape, body proportions, body measurements.

7. (Original) The method of claim 1, wherein said input device comprises a digital camera.

8. (Canceled)

9. (Canceled)

10. (Canceled)

11. (Original) The method of claim 1, wherein said style database further comprises footwear information.

12. (Original) The method of claim 1, wherein said style database further comprises clothing information.

13. (Previously presented) The method of claim 12, wherein said clothing information includes clothing data selected from a group consisting of: size data, style data, fabric color data and fabric texture data.

14. (Previously presented) The method of claim 1, wherein said personal characteristic database is accessible via a computer network.

15. (Canceled)

16. (Previously presented) A method for providing fashion information for an individual, said method comprising the steps of:

providing a style database having complimentary fashion information;

providing a personal characteristic database being adapted to receive physical characteristic data for an individual;

providing an input device operable to capture an image of the individual, the image comprising data of at least two physical characteristics about the individual;

capturing with the input device an image of the individual comprising data for at least two physical characteristics of the individual;

receiving in the personal characteristic database physical characteristic data for at least two physical characteristics for an individual;

comparing said physical characteristic data for the individual with said style database to identify appropriate fashion selections for the individual based upon the at least two physical characteristics communicated to the personal characteristic database; and

generating a printout data set that includes fashion selections that are appropriate for the individual based upon the at least two physical characteristics communicated to the personal characteristic database.

17. (Previously presented) The method of claim 16, wherein the at least two physical characteristics are selected from a group consisting of: skin color, skin tone, hair color, eye color, facial shape, body proportions, body measurements.

18. (Previously presented) The method of claim 16, wherein the complimentary fashion information comprises clothing information.

19. (Previously presented) The method of claim 18, wherein the clothing information is selected from a group consisting of: clothing size, clothing style, clothing fabric color and clothing fabric texture.

20. (Previously presented) The method of claim 16, wherein the complimentary fashion information comprises cosmetic data.

21. (Previously presented) The method of claim 19, wherein the complimentary fashion information comprises footwear information.

22. (Previously presented) The method of claim 19, wherein said fashion selections are selected from the group consisting of: cosmetic information, clothing information and footwear information.

23. (Previously presented) The method of claim 16, wherein said input device comprises a camera.

24. (Canceled)

25. (Canceled)

26. (Canceled).

27. (Previously presented) A method for selecting fashion information for an individual comprising the steps of:

providing a style database including complimentary fashion information having cosmetic data and physical characteristic data;

providing a personal characteristic database adapted to receive physical characteristic data for an individual;

providing an input device operable to capture an image of the individual comprising data of at least two physical characteristics about the individual;

receiving in the style database from the input device an image of the individual having data for two physical characteristics for the individual;

receiving in the style database a requested result for the individual;

comparing in the style database the physical characteristic data for the individual with the requested result to identify complimentary fashion selections that achieve the requested result for the individual based upon the received physical characteristic data; and

generating a data set sheet that includes complimentary fashion selections that achieve the requested result for the individual based upon the received physical characteristic data.

28. (Previously presented) The method of claim 27, wherein the complimentary fashion information comprises clothing information.

29. (Previously presented) The method of claim 28, wherein the clothing information is selected from a group consisting of: clothing size, clothing style, clothing fabric color and clothing fabric texture.

30. (Previously presented) The method of claim 29, wherein the complimentary fashion information comprises cosmetic data.

31. (Previously presented) The method of claim 29, wherein the complimentary fashion information comprises footwear information.

32. (Previously presented) The method of claim 27, wherein said fashion selections are selected from the group consisting of: cosmetic information, clothing information and footwear information.

33. (Previously presented) A method for selecting fashion information for an individual comprising the steps of:

providing a style database including complimentary fashion information;

providing a personal characteristic database adapted to receive physical characteristic data for an individual;

providing an input device operable to capture physical characteristic data about the individual;

capturing an image of the individual with the input device, the image including data for at least two physical characteristics of the individual;

receiving in the personal characteristic database the image captured by the input device;

receiving in the style database a requested result for the individual;

comparing said physical characteristic data from the image of the individual with the style database to identify complimentary fashion selections that achieve the requested result for the individual based upon the physical characteristic data received in the personal characteristic database; and

generating a data set booklet for the individual that includes complimentary fashion selections that achieve the requested result for the individual based upon the physical characteristic data received in the personal characteristic database.

34. (Previously presented) The method of claim 33, wherein the at least two physical characteristics are selected from a group consisting of: skin color, skin tone, hair color, eye color, facial shape, body proportions, body measurements.

35. (Previously presented) The method of claim 33, wherein the complimentary fashion information comprises clothing information.

36. (Previously presented) The method of claim 35, wherein the clothing information is selected from a group consisting of: clothing size, clothing style, clothing fabric color and clothing fabric texture.

37. (Previously presented) The method of claim 33, wherein the complimentary fashion information comprises cosmetic data.

38. (Previously presented) The method of claim 37, wherein the complimentary fashion information comprises footwear information.

39. (Previously presented) The method of claim 37, wherein said fashion selections are selected from the group consisting of: cosmetic information, clothing information and footwear information.

40. (Previously presented) The method of claim 33, wherein said input device comprises a camera.

41. (Canceled)

42. (Canceled)

43. (Cancelled)

Evidence Appendix
(37 C.F.R. § 41.37(c)(1)(ix))

The section is not applicable to the present appeal.

Related Proceedings Appendix
(37 C.F.R. § 41.37(c)(1)(x))

The section is not applicable to the present appeal.

**Certificate of Service
(37 C.F.R. § 41.37(c)(1)(xi)).**

The section is not applicable to the present appeal.